

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

NOE CORP. LLC

Licensee of Station KNOE-TV, Monroe,
Louisiana

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File Number EB-03-IH-0508
NAL/Acct. No. 200532080026
Facility ID No. 48975
FRN No. 0001716588

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 11, 2005

Released: January 13, 2005

By the Chief, Investigations and Hearings Division, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”), issued pursuant to section 503(b) of the Communications Act of 1934, as amended (the “Act”) and section 1.80 of the Commission’s rules,¹ we find that NOE Corp. LLC (“NOE”), licensee of Station KNOE-TV, Monroe, Louisiana, twice recorded telephone conversations for broadcast without informing parties to the calls of its intention to broadcast the conversations, in apparent willful and repeated violation of section 73.1206 of the Commission’s rules.² Based on our review of the facts, we conclude that NOE is apparently liable for a monetary forfeiture in the amount of \$10,000.

II. BACKGROUND

2. By letter dated September 23, 2003, Mack Calhoun, who serves on the Police Jury for Ouachita Parish in Louisiana,³ filed the first of three complaints with the Commission.⁴ Calhoun asserted that, on or about September 12, 2003, Station KNOE-TV news reporter Ken Booth (“Booth”) telephoned Calhoun’s residence and, without providing prior notice to Calhoun, recorded his outgoing voice mail message with the intent to broadcast the recording.⁵ According to Calhoun, who provided a video tape

¹47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

²47 C.F.R. § 73.1206.

³ This position is similar to the county commissioners of other states.

⁴See Letter from R. Steven Calhoun, Esq., counsel for Mack Calhoun, to Enforcement Bureau, Federal Communications Commission, dated September 23, 2003 (“September 23 Complaint”).

⁵*Id.* at 1.

with his complaint, Station KNOE-TV broadcast the recorded voice mail message during its evening news on September 12, 2003.⁶ Thereafter, by letters dated September 26, 2003, and April 20, 2004,⁷ Calhoun filed two more complaints with the Commission, each accompanied by video tapes. Calhoun states in the latter correspondence that Booth telephoned his residence again on September 25, 2003.⁸ According to Mr. Calhoun's complaints, when he answered the telephone and Booth identified himself as the caller, Calhoun immediately hung up.⁹ Calhoun alleges that Booth did not notify him at the time that he was recording the exchange with the intent of broadcasting it over Station KNOE-TV.¹⁰ Calhoun states that Station KNOE-TV broadcast a recording of the brief dialogue during its newscast that evening.¹¹ Calhoun also alleges in the latter complaint that Station KNOE-TV rebroadcast the initial recording of his outgoing voice mail message during yet another evening newscast on April 20, 2004.¹²

3. By letter of inquiry dated May 17, 2004, the Enforcement Bureau directed NOE to provide information about its broadcast of conversations involving Calhoun.¹³ In its initial response as well as a subsequent filing¹⁴ NOE admits that, on September 12, 2003, Booth telephoned Calhoun's residence for the purpose of conducting and recording for later broadcast an interview with Calhoun about a news story on which Booth was then working.¹⁵ NOE argues that it had no intent at the time to record Calhoun's outgoing voice mail message from his answering machine.¹⁶ Nevertheless, when no one answered the telephone, NOE concedes that Booth recorded Calhoun's outgoing voice mail message and Station

⁶*Id.*

⁷See Letter from R. Steven Calhoun, Esq., counsel for Mack Calhoun, to Enforcement Bureau, Federal Communications Commission, dated September 26, 2003 ("September 26 Complaint"); Letter from R. Steven Calhoun, Esq., counsel for Mack Calhoun, to Enforcement Bureau, Federal Communications Commission, dated April 20, 2004 ("April 20 Complaint").

⁸September 26 Complaint at 1; April 20 Complaint at 1-2.

⁹April 20 Complaint at 1-2.

¹⁰*Id.* at 3.

¹¹*Id.*

¹²*Id.*

¹³ See Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to NOE Corp. LLC, dated May 17, 2004.

¹⁴See Letter from Robert B. Jacobi, counsel for NOE Corp., to William Knowles-Kellett, Esq., Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 16, 2004 ("NOE June 16, 2004, letter"). Letter from Robert B. Jacobi, counsel for NOE Corp., to William Knowles-Kellett, Esq., Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated August 13, 2004 ("NOE August 13, 2004, letter").

¹⁵NOE June 16, 2004 letter at 2.

¹⁶*Id.* at 3.

KNOE-TV broadcast it that evening and again in April 2004.¹⁷ Although NOE concedes that Booth did not notify Calhoun at the time of the telephone call that he was recording it for broadcast,¹⁸ it argues that such notification is unnecessary because a voice mail message does not constitute a “conversation” for purposes of triggering the notification requirement of section 73.1206.¹⁹

4. NOE also concedes that Booth telephoned Calhoun on September 25, 2003, and, without notifying Calhoun, recorded their exchange in which Calhoun hung up upon learning that Booth was the caller. Although NOE states that Station KNOE broadcast the exchange that evening, it denies that the broadcast included Calhoun’s voice.²⁰

5. NOE argues, in any event, that section 73.1206 is inapplicable because this matter presents unique circumstances involving an individual who, because of his status as a public official, has waived any right to privacy that section 73.1206 is designed to protect. NOE further states in this regard that Calhoun should be presumed to be aware that any conversation with him is likely to be broadcast, and Station KNOE-TV is entitled to use the telephone as a legitimate tool with which to conduct its investigative reporting.²¹

III. DISCUSSION

6. Section 73.1206 of the Commission's rules provides, in pertinent part:

Before recording a telephone conversation for broadcast . . . a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, except where such party is aware, or may be presumed to be aware from the circumstances of the conversation, that it is being or likely will be broadcast. Such awareness is presumed to exist only when the other party to the call is associated with the station (such as an employee or part-time reporter), or where the other party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations.

7. Under section 73.1206, a licensee must notify a party to a telephone call *before* it commences recording the conversation of its intention to record the conversation for broadcast. In this regard, the Commission has stated that “[t]he recording of such conversation with the intention of informing the other party later -- whether during the conversation or after it is completed but before it is broadcast -- does not

¹⁷NOE August 13, 2004, letter at 4.

¹⁸NOE June 16, 2004 letter at 4.

¹⁹ Memorandum in Support of KNOE-TV Response to Commission Letter of Inquiry, attached to the NOE June 16, 2004 letter, at 2.

²⁰NOE August 13, 2004, letter at 4.

²¹Memorandum in Support of KNOE-TV Response to Commission Letter of Inquiry, attached to the NOE June 16, 2004 letter, at 5-6.

comply with the Rule"²² The rule reflects the Commission's longstanding policy that prior notification is essential to protect individuals' legitimate expectation of privacy, as well as to preserve their dignity by avoidance of nonconsensual broadcasts of their conversations.²³ Thus, the Commission has held that the prior notification requirement ensures the protection of an individual's "right to answer the telephone without having [his or her] voice or statements transmitted to the public by a broadcast station" live or by recording for delayed airing.²⁴

8. In the instant case, we find that NOE twice recorded a telephone conversation for broadcast without informing the other party thereto of its intent to do so. In the first instance, a Station KNOE-TV news reporter recorded Calhoun's outgoing voice mail message on September 23, 2003, without notifying Calhoun of his intent to use the recording for later broadcast. Station KNOE-TV subsequently broadcast the recording on two separate occasions: September 23, 2003, and April 20, 2004. In the second instance, the same Station KNOE-TV news reporter recorded a telephone conversation with Calhoun on September 25, 2003, again without notifying Calhoun of his intent to use the recording for later broadcast. Station KNOE-TV subsequently broadcast the brief dialogue that evening. Calhoun's voice as he answered the telephone just prior to hanging up is clearly audible.

9. We find no merit to NOE's claim that it was unnecessary to provide the notification required by section 73.1260 because a voice mail message does not constitute a "conversation" within the meaning of the rule. We have previously held that "it is reasonable and desirable to retain for individuals the right to answer the telephone without having their voices or statements transmitted to the public by a broadcast station in the absence of prior notice."²⁵ The "right to answer without having one's voice transmitted to the public exists irrespective of whether the voice broadcast or recorded for later broadcast is live or is lifted from an answering machine."²⁶ Thus, in order to ensure the protection of an individual's "privacy rights, a broadcast station must give notice of its intent to broadcast the conversation before transmitting or recording for later transmission of the telephone call."²⁷ Additionally, we also stated that the term "[c]onversation" as used in the rule includes any word or words spoken during the call."²⁸ In the instant case, Calhoun's outgoing voice mail message satisfies the requirements of a "conversation," thus requiring NOE to have provided appropriate notice.

10. We also find no merit to NOE's claim that Calhoun "is a party presumed to be aware that his

²² *Station-Initiated Telephone Calls which Fail to Comply with Section 73.1206 of the Rules*, Public Notice, 35 FCC 2d 940, 941 (1972) ("1972 Public Notice").

²³ *See Amendment of Section 1206: Broadcast of Telephone Conversations*, Report and Order, 3 FCC Rcd 5461, 5463-64 (1988) ("1988 Order"); 1972 Public Notice, 35 FCC 2d at 941; *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to the Broadcast of Telephone Conversations*, Report and Order, 23 FCC 2d 1, 2 (1970); *see also WXJD Licensing, Inc.*, Forfeiture Order, 19 FCC Rcd 22445 (Enf. Bur. 2004); *Saga Communications of New England Inc.*, Forfeiture Order, 19 FCC Rcd 19743, (Enf. Bur. 2004) .

²⁴ 1988 Order, 3 FCC Rcd at 5463.

²⁵ *AMFM Radio Licenses*, Notice of Apparent Liability, 17 FCC Rcd 5032, 5033 (Enf. Bur. 2002) (NAL paid).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

voice mail message would likely be broadcast.”²⁹ Section 73.1206 sets forth the limited circumstances under which one may be assumed to be aware that a telephone conversation in which he is a party is being recorded for broadcast, none of which is applicable here. Under section 73.1206, such awareness is presumed *only* when the party to the call is associated with the station or where the party originates the call and it is obvious that it is in connection with a program in which the station customarily broadcasts telephone conversations. In the instant case, Calhoun was not associated with Station KNOE-TV and he did not originate the telephone calls in question.

11. We also reject NOE’s argument that Calhoun somehow waived his right to privacy because of his status as a public official. Such status does not establish a legal basis for assuming that any telephone conversation with Calhoun could be recorded and subsequently broadcast without prior notice.³⁰ Similarly, the fact that Booth previously called Calhoun and left messages requesting an interview does not exempt NOE from providing the required prior notification incident to the September 12, 2003, telephone call.

12. Finally, NOE’s claim that Station KNOE-TV’s broadcast of Calhoun’s “was fully protected by the First Amendment” is also without merit. While the Commission recognizes broadcasters’ First Amendment concerns regarding section 73.1206 notice requirements, the Commission has held that “these limitations are both reasonable and necessary to protect the legitimate interests of the public in privacy in communications” and do not infringe upon broadcasters’ right to gather information “important to their broadcast function.”³¹

13. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission’s rules, 47 C.F.R. § 1.80, both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term “willful” means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission’s rules.³² Based on the material before us, it appears that on September 12, 2003 and September 25, 2003, NOE apparently willfully and repeatedly violated section 73.1206 of the Commission’s rules by recording a telephone conversation for broadcast without providing the requisite notification.

14. The Commission’s Forfeiture Policy Statement sets a base forfeiture amount of \$4,000 for the unauthorized broadcast of a telephone conversation³³ and provides that base forfeitures may be

²⁹ Memorandum in Support of KNOE-TV Response to Commission Letter of Inquiry, attached to the NOE June 16, 2004 letter, at 3.

³⁰ *El Mundo Broadcasting Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 20377, 20379 (Enf. Bur. 2000) (Bureau refused to recognize an exception to Section 73.1206 notice requirements where the conversation recorded and subsequently broadcast involved a well known on-air personality and a government official.)

³¹ *Amendment of Section 1206: Broadcast of Telephone Conversations*, 3 FCC Rcd 5461 (1988).

³² See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 (1991).

³³ 47 C.F.R. § 1.80.

adjusted based upon consideration of the factors enumerated in section 503(b)(2)(D)³⁴ and 1.80(a)(4),³⁵ which include "the nature, circumstances, extent, and gravity of the violation ... and the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."³⁶ In light of NOE's rebroadcast of the first recording, we find that an upward adjustment to the base forfeiture amount is appropriate for the September 12, 2003 violation. Therefore, based upon the facts and circumstances presented here, we find that NOE is apparently liable in the amount of \$10,000 for violating the telephone broadcast rule on two occasions, \$6,000 for the September 12 recording and \$4,000 for the September 25 recording.

IV. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended,³⁷ and sections 0.111, 0.311 and 1.80 of the Commission's rules,³⁸ NOE, LLC, licensee of Station KNOE-TV, Monroe, Louisiana, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of \$10,000.00 for apparently willfully and repeatedly violating section 73.1206 of the Commission's rules.

16. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the rules,³⁹ within thirty (30) days of this NOTICE OF APPARENT LIABILITY, NOE, LLC, SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

17. IT IS FURTHER ORDERED THAT payment of the forfeiture shall be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment shall include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, Illinois 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

18. IT IS FURTHER ORDERED THAT the response, if any, shall be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-C330, Washington, D.C. 20554 and MUST INCLUDE THE NAL/Acct. No. referenced above.

19. IT IS FURTHER ORDERED THAT requests for payment of the full amount of this Notice

³⁴ 47 U.S.C. § 503(b)(2)(D).

³⁵ 47 C.F.R. § 1.80(a)(4).

³⁶ *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01.

³⁷ 47 U.S.C. § 503(b).

³⁸ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

³⁹ 47 C.F.R. § 1.80.

of Apparent Liability under an installment plan shall be directed to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.⁴⁰

⁴⁰ 47 C.F.R. § 1.1914.

20. IT IS FURTHER ORDERED that a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail - Return Receipt Requested to NOE, LLC, 1400 Oliver Road, Monroe, LA 71201 and to NOE, LLC's counsel: Robert B. Jacobi, Esquire, Cohn and Marks, LLP, Suite 300, 1920 N. Street, N.W., Washington, DC 20036; and by regular mail to R. Steven Calhoun, Esquire, The Law Office of R. Steven Calhoun, APLC, 3711 Cypress Street, Suite 4, West Monroe, LA 71291.

FEDERAL COMMUNICATIONS COMMISSION

William H. Davenport
Chief, Investigations and Hearings Division
Enforcement Bureau